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IN THE

Supreme Court of the United States

October Term, 1955

No. 254

LYKENS HOSIERY MILLS, INC.,
Petitioner,

vs.

DWIGHT S. WILLIAMS CO., INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Lykens Hosiery Mills, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above case on May 15, 1956.

Opinions Below

The opinion of the District Court for the Western District of North Carolina (Appendix, pp. 26-32) was rendered on October 24, 1955, and is reported at 135 F. Supp. 213. The opinion of the Court of Appeals for the Fourth Circuit (Appendix, pp. 17-25) was rendered on May 15, 1956 and is not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was made and entered on May 15, 1956, and a copy thereof is appended to this petition in the Appendix at pages 17-25. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

In a civil action praying for a permanent injunction against alleged infringement of trade marks and alleged unfair competition, the District Court made findings of fact and conclusions of law in favor of the defendant, and petitioner herein, and dismissed the complaint of the plaintiff.

The action was predicated upon the adoption and use by the plaintiff below as a trade mark the word "Railroad" in connection with the design of a train in the sale of hosiery products and the alleged infringement thereof and the unfair competition by the defendant Lykens, the petitioner herein, by the adoption and use of the brand name "Trainman" and the pictorial design of a modern streamlined train in connection with the packaging of its men's work sock. The District Court determined that the defendant had neither infringed the trade mark of the plaintiff nor engaged in unfair competition.

The Court of Appeals for the Fourth Circuit reversed the judgment of the District Court and remanded the cause with instructions to grant the injunction sought by the plaintiff. In reversing the District Court on its findings of fact and conclusions of law, the Court of Appeals, in effect, retried the facts as determined by the District Judge and came to new conclusions. The questions presented are:

1. Whether the action of the Court of Appeals, in reversing the judgment of the District Court, was violative of Rule 52 of the Federal Rules of Civil Procedure, set forth in the Appendix herein, page 33, in that due regard was not given to the opportunity of the Trial Court to judge the credibility of the witnesses, and the findings of fact made by the District Court were not such that they are to be deemed clearly erroneous.

2. Whether the effect of the decision rendered by the Court of Appeals for the Fourth Circuit herein is such as to create a conflict of authority in the various United States Courts of Appeals with respect to the rights of parties to the use of names, designs and marks in the sale and merchandising of their products, in the face of a claim of infringement of trade mark and unfair competition, which conflict should be resolved by this Court.

3. Whether the decision of the Court of Appeals is in conflict wih the decisions of this Court with respect to the rights of parties to the use of names, designs and marks in the sale and merchandising of their products, in the face of a claim of infringement of trade mark and unfair competition.

Statutes, Federal Rules and Regulations Involved

The pertinent portions of Rule 52 of the Federal Rules of Civil Procedure are set forth in the Appendix at page 33.

Statement

This is a civil action arising from a claim by the plaintiff below (hereinafter referred to as "Williams") that the defendant below, and petitioner herein (hereinafter referred to as "Lykens"), had infringed certain trade marks of Williams and engaged in unfair competition.

Williams, in its complaint for relief seeking a permanent injunction and accounting, alleged the adoption and use by it as a trade mark of the word "Railroad" in connection with the design of a railroad train (not of modern design), in the sale of its hosiery products. Williams further alleged the adoption and use by Lykens of the trade mark "Trainman" and the use of the pictorial design of a railroad train in connection with the sale of its hosiery products, and contended that such use infringed its alleged trade mark "Railroad" and was unfair competition.

Lykens, for its answer, admitted the adoption and use by it of the trade mark "Lykens" for hosiery products manufactured and sold by it, and the use of a brand name, "Trainman", and a pictorial design of a modern streamlined railroad train, in connection with the packaging of its fine quality men's work socks.

Lykens further denied that Williams had any distinctive or prescriptive trade mark right to the exclusive use of the word "Railroad" or of the pictorial representation of a train, on the grounds of a general and common use of pictorial representations of a railroad train in connection with the sale of numerous products, as evidenced by many prior United States trade mark registrations in connection with the following products: one registration for hosiery; four for shoes; thirteen for overalls, and five for gloves.

Lykens, in addition, denied any confusing similarity between the name, design and packaging of Williams' product and its own, and disclaimed any intention to deceive and denied the existence of the likelihood of purchasers being confused by the two products.

The case was tried before United States District Judge Wilson Warlick who made findings of fact and conclusions of law in favor of Lykens, as set forth in his able and comprehensive opinion (Appendix, pp. 26-32)and there-

after rendered judgment in favor of Lykens and against Williams.

The District Judge, after an exhaustive analysis and comparison of the trade marks, packaging and designs adopted and used by the respective parties, came to the conclusion that there was "no similarity in the two labels and that no confusion would likely result to a purchaser who would exercise ordinary care and prudence, since each is so vastly different from the other". 135 F. Supp. 213, 217.

The District Judge went on to say, 135 F. Supp. 213, 217:

> "In fact it is inconceivable to me that one desiring to purchase work socks would be deceived in favor of defendant's 'Trainman Socks' as packaged over against the 'Railroad Sock' of the plaintiff. I therefore am of the opinion that the trade marks are wholly unlike and there is no likelihood of confusion: that there is no infringement of plaintiff's marks and that the plaintiff is not entitled to enjoin defendant from the use of its wrapper. That there has been no unfair competition and that plaintiff is not entitled to recover."

The District Judge found that there was no evidence of probative value offered of actual instances of confusion in the purchase of the goods marketed by the respective parties and, in coming to his conclusions, applied the following test: whether the similarity in the labels would properly deceive a purchaser who exercised ordinary prudence, not the careless buyer who makes no examination.

Thus, the Trial Court, after an exhaustive trial of the issues presented and a close examination of the trade marks, packaging and designs at issue, concluded that there was no similarity between the two and that no confusion would result to a purchaser who exercised ordinary care and prudence.

Thereafter, judgment having been rendered in favor of Lykens, Williams appealed from this judgment to the United States Court of Appeals for the Fourth Circuit. The appeal was argued on April 11, 1956 and decided on May 15, 1956. The Court of Appeals reversed the judgment of the District Court and remanded the case to that Court with instructions to issue the injunction sought by Williams.

The basis for this reversal is stated by the Court of Appeals, as follows:

> "A careful study of the entire record here convinces us that the conduct of Lykens cannot be explained by the long arm of coincidence. On the contrary, we think there was a clear attempt by Lykens 'to get under the umbrella' of Williams. In our view, the use by Lykens of 'Trainman' as contrasted with 'Railroad', the use of a picture of a train by Lykens and the similarity between the Williams' package and that of Lykens, lead us to the conclusion that Lykens has both infringed the trade-mark of Williams and has been guilty of unfair competition" (Appendix, p. 25).

The Court of Appeals, in substituting its own findings of fact for those of the District Judge, stated that the Court could not agree with the conclusion reached by the District Judge, "after a careful and painstaking study of the label, the contents, markings, get-up and the over-all appearance of each" (135 F. Supp. 213, 217), that there was no similarity in the two labels and that no confusion would likely result to a purchaser who would exercise ordinary care and prudence (Appendix, p. 24).

The Court further disregarded the findings of the District Judge and determined that there was "a clear likeness between the word 'Railroad' used here by Williams

and the word 'Trainman' employed by Lykens" (Appendix, p. 23). The Court further determined, again in the face of the findings of the District Judge, that there was a likelihood of confusion in this matter, emphasizing the one doubtful instance of actual confusion adduced by Williams (Appendix, p. 23).

Thus, the issue presented squarely on this application for a writ of certiorari is as follows: The District Court, after hearing all the evidence and witnesses, judging the credibility of the witnesses and examining exhaustively the label, the contents, markings, get-up and over-all appearance of the trade mark, designs and packaging employed by the respective parties, concluded that Lykens had not infringed the registered trade marks of Williams and that the acts of Lykens did not constitute unfair competition with Williams. The Court of Appeals, on the same record, and without the opportunity of hearing the evidence first-hand and judging the credibility of the witnesses, reached an entirely opposite conclusion.

Reasons for Granting Writ

1. The setting aside of the findings of fact of the District Court was violative of Rule 52 of the Federal Rules of Civil Procedure (Appendix, p. 33). Rule 52 of the Federal Rules of Civil Procedure provides in part as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

In the instant case the District Court, "after a careful and painstaking study of the label, the contents, markings, get up, and the over all appearance of each", and a determi-

nation that "no evidence of probative value was offered of actual instances of confusion in the purchase of these goods", and "that no confusion would likely result to a purchaser who would exercise ordinary care and prudence", made the findings of fact that there was no similarity in the labels, that a reasonably prudent purchaser would not be deceived by the respective packaging of plaintiff's "Trainman Socks" and the defendant's "Railroad Sock", and that there is no likelihood of confusion between plaintiff's and defendant's products. 135 F. Supp. 216, 217.

The rule as to the power and function of the Court of Appeals on review is aptly set forth by Judge Sanborn in *Cleo Syrup Corp.* v. *Coca-Cola Co.*, 8th Cir., 139 F. (2d) 416, 417-418, cert. den. 321 U. S. 781, as follows:

> "This Court upon review will not retry issues of fact or substitute its judgment with respect to such issues for that of the trial court. (Citing cases.) The power of a trial court to decide doubtful issues of fact is not limited to deciding them correctly. (Citing cases.) In a non-jury case, this court may not set aside a finding of fact of a trial court unless there is no substantial evidence to sustain it, unless it is against the clear weight of evidence, or unless it was induced by an erroneous view of the law. (Citing cases)."

As to the rule that a reviewing court is bound to accept the Trial Court's findings of fact when no clear error appears, see *Electro-Metallurgical Co.* v. *Krupp Nirosta Co.*, 3rd Cir. 122 F. (2d) 314; *Middle West Const. Inc.* v. *Metropolitan District*, 2d Cir., 133 F. (2d) 468; *MacDonnell* v. *Capital Co.*, 9th Cir., 130 F. (2d) 311.

It has been said that the Court "will not disturb the findings unless they cannot be sustained upon any rational view of all the evidence including all reasonable infer-

ences". *Shapiro* v. *Rubens*, 7th Cir., 166 F. (2d) 659, 665-666; and the mere fact that the Trial Court could have viewed the facts differently or that the Court of Appeals might have done so if it had been the initial trier of the case, *Nee* v. *Linwood Securities Co.*, 8th Cir., 174 F. (2d) 434, 437; (see also *United* v. *Protsch*, 10th Cir., 137 F. (2d) 92), or that it disagrees with the findings of the District Court, *Blytheville Cotton Oil Co.* v. *Kurn*, 6th Cir., 155 F. (2d) 467, is not sufficient grounds to reverse the District Court. Mr. Justice Douglas in *United States* v. *National Ass'n. of Real Estate Bds.* (1950), 339 U. S. 485, 495-496, concisely states the rule, as follows: "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent (citing cases). We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous'."

The Appellate Court considers only the evidence that supports the District Court's finding, it does not weigh the evidence or resolve any conflicts therein. *Fox River Paper Corp.* v. *United States*, 7th Cir., 16 F. (2d) 639; *Peck* v. *United States*, 10th Cir., 172 F. (2d) 336; *Kaname Fijino* v. *Clark*, 9th Cir., 172 F. (2d) 384; and in considering the record, the Court of Appeals must look only to the evidence most favorable to the District Court's findings and such reasonable inferences as may be drawn from such evidence. *Lewis Machine Co.* v. *Aztec Lines, Inc.*, 7th Cir., 172 F. (2d) 746.

In the case at bar, there is substantial evidence to sustain the findings of fact made by the District Court and therefore they cannot be said to be erroneous. *Kincade* v. *Mikles*, 8th Cir., 144 F. (2d) 784; *Gray* v. *United*, 8th Cir., 109 F. (2d) 728; *Deep Rock Oil Corp.* v. *Salisbury*, 8th Cir., 130 F. (2d) 387; *Bradley* v. *Smith*, 7th Cir., 114 F. (2d) 161. The credible evidence having probative value does not indicate any evidence of actual confusion (135 F. Supp.

216). The credibility of witnesses is within the province of the trier of the facts and any fact finding predicated on the Trial Judge's opportunity to hear and observe the witnesses will be given great weight and will be disturbed only in the most unusual circumstances. *Thatenhorst* v. *United States*, 10th Cir., 119 F. (2d) 567; *Augustine* v. *Bowles*, 9th Cir., 149 F. (2d) 93; *Johnson* v. *Blankenship*, 8th Cir., 152 F. (2d) 99; *United States* v. *McCain*, 10th Cir., 118 F. (2d) 479.

2. There is a conflict amongst the various Courts of Appeals as relates to the rights of parties to the use of names, designs and marks under a claim of infringement and unfair competition.

Although certain general rules relating to trade mark infringement and unfair competition are recognized by the courts, the application of these rules has left a myriad of cases in which a litigant finds himself in limbo when endeavoring to ascertain his rights.

The Court of Appeals in reversing the District Court stated that they "think there is a likeness between the word 'Railroad' used here by Williams, and the word 'Trainman' employed by Lykens" (Appendix, p. 23), citing cases purporting to sustain the position of the respondent-plaintiff. A reference to the case law shows many decisions holding no similarity or infringement in names clearly more similar by mere eye perusal.

The following names were held not to be infringing:

"Sal-Vet" not infringed by "Sal Tone".[1]
"Strongheart" not infringed by "Red Heart".[2]
"Steem-Electric" not infringed by "Steam-O-Matic".[3]

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[1] *Feil Co.* v. *John E. Robins Co.*, 7th Cir., 220 Fed. 650.

[2] *John Morrell Co.* v. *Doyle*, 7th Cir., 97 F. (2d) 232.

[3] *Steem-Electric Corp.* v. *Herzfeld-Phillipson Co.*, 7th Cir., 118 F. (2d) 122.

"Vapex" not infringed by "Vapure".[4]
"Rytex" not infringed by "Rynart".[5]
"Balaiza" not infringed by "Bellezza".[6]
"Zero King" not infringed by "Zeroland".[7]
"Amami" not infringed by "Aime".[8]

It is urged that a dangerous precedent has been set by the Court of Appeals. The Court has given the plaintiff "rather broad rights to any device, mark or symbol of this character (railroad mark and the pictorial representation of a train) within the significance and meaning of train or railroad, as applied to men's socks" (Appendix, p. 22). The preemption of the entire field of men's hosiery is but a step forward to arrogating to the plaintiff similar rights with respect to other items of wearing apparel, since many courts have held that one is not necessarily limited to the same articles in his endeavor to enjoin the use of a similar name.

The effect of the decision of the Court of Appeals is two-fold: (1) to ignore completely the existence of at least twenty-three (23) prior registered trade marks dealing with wearing apparel (Plaintiff's Exhibit 7, R., p. 15) containing a pictorial illustration of a train or in some way related to trains; (2) to grant plaintiff the exclusive rights to a pictorial representation of a train that has been and is *publici juris*. Obtaining a trade mark under the statute gives the registrant no substantive rights beyond what they would be under common law principles. Such registration merely gives jurisdiction to United States courts and gives the registrant certain procedural advantages. *May, et al.*

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[4] *Thomas Keerfoot and Co.* v. *Louis K. Leggett Co.*, 1st Cir., 67 F. (2d) 214.

[5] *Rytex Co.* v. *Ryan*, 7th Cir., 126 F. (2d) 952.

[6] *Lucien Lelong, Inc.* v. *Lenel, Inc.*, 5th Cir., 181 F. (2d) 3.

[7] *B. W. Harris Mfg. Co.* v. *Werber Sportwear Co.*, 138 F. (2d) 105.

[8] *Prichard & Constance* v. *Aime*, 5 F. Supp. 282.

v. *Goolyear Tire & Rubber Co.*, 10 F. Supp. 249; *Leadway Stores Corp.* v. *Paul Hawkins Co.*, 57 U. S. P. Q. 171, 33 TM Rep. (II) 362; *B. B. Pen Co.* v. *Brown & Bigelow*, 92 F. Supp. 272, aff'd 191 F. (2d) 939, cert. den. 343 U. S. 920.

> "Registration does not create a trademark. It is not essential to its validity * * * Since as it appears these statutes confer no rights whatever, but merely furnish a method for spreading on the records the evidence of already existing rights, plaintiff can draw no comfort from them, and his cause must stand on the common law." *Pulitzer Pub. Co.* v. *Houston Printing Co.*, 4 F. (2d) 924, 926-7, aff'd 11 F. (2d) 834. (See also *Stern Apparel Corp.* v. *Raingard, Inc.*, 87 F. Supp. 621; *Best & Co.* v. *Miller*, 167 F. (2d) 374, cert. den. 335 U. S. 818; *King Pharr Canning Operations* v. *Pharr Canning Co.*, 85 F. Supp. 150; *Western Stove* v. *George D. Roper Co.*, 82 F. Supp. 206.)

Hopkins on Trademarks, Tradenames and Unfair Competition, Fourth Edition, at page 415, concisely states the rule:

> "The fact that the Complainant's trademark is registered does not deprive the public of the right to use a similar name which was common to the trade before registration."

So, here, the mere fact that the plaintiff obtained a registration of the pictorial illustration of a train (as did twenty-three prior registrants) did not grant to the plaintiff the exclusive right to employ any and all pictorial illustrations of trains and anything "within the significance and meaning of train or railroad", to the exclusion of all others.

The doctrine of unfair competition cannot be invoked successfully to abridge the freedom of trade competition.

Marvel v. *Pearl*, 2d Cir., 133 Fed. 160, 162. See also *Gillette Safety Razor Co.* v. *Triangle Mechanical Laboratories Corp.*, 4 F. Supp. 319.

The courts refuse to grant monopolies on words within the public domain, *Reo Motor Car Co.* v. *Traffic Motor Truck Corp.*, D. C. Cir., 4 F. (2d) 303;[9] or which have come into use as a descriptive term, *Parfumerie Roger & Gallet* v. *John Wanamaker*, D. C. Cir., 20 F. (2d) 283;[10] or pictures which are *publici juris*, *Walter M. Lowney Co.* v. *Chandler & Rudd Co.*, D. C. Cir., 12 F. (2d) 189.[11]

Relief has been denied where the resemblance is principally in features often combined in common use, even though there may be some confusion. *United States Tobacco Co.* v. *McGreenery*, 144 Fed. 531, aff'd 144 Fed. 1002. See also *Schlitz Brewing Co.* v. *Houston Ice Co.*, 250 U. S. 28, 29, where labels were only differentiated by the presence of the manufacturer's name. In the case at bar, the defendant's label was clearly differentiated from plaintiff's label by the conspicuous presence of the name "Lykens" thereon.

It is respectfully submitted that the decision of the Court of Appeals below is in conflict with the decisions in other circuits. The effect of this decision is so disruptive of free competition and arrogates to the plaintiff so broad an area in the use of a name and design in the public domain that it creates a dangerous precedent that should not be allowed to stand. In this respect, the questions presented by the decision rendered by the Court of Appeals

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[9] The owner of mark "Speed Wagon" could not prohibit registration of "Speedboy", because to do so would be to prevent the use of a purely descriptive word to describe a product.

[10] "Fleurs d'Amour" and "Bouquet d'Amour" not infringed by "Charme d'Amor" because word "amour" was found to have "come into use as a descriptive term".

[11] Two marks each containing a picture of a mattress, not similar since picture was *publici juris*.

for the Fourth Circuit are of paramount importance and should be resolved by this Court.

3. The decision of the Court of Appeals is in conflict with the policy of this Court. It was incumbent upon the plaintiff, and it had the burden of proof, to demonstrate by credible evidence that the ordinary mass of purchasers giving that attention that reasonable purchasers usually give in buying the article in question would be confused and deceived. *Mishawaka Rubber Co.* v. *S. S. Kresge Co.*, 119 F. (2d) 316, cert. granted, 314 U. S. 603, reversed, 316 U. S. 203. See also: *Kann* v. *Diamond Steel Co.*, 89 Fed. 706, 710. The proof must be that the goods are so similar that *prudent* buyers would be deceived. *Century Distilling Co.* v. *Schneider Brewing Co.*, 26 F. Supp. 936, 937, aff'd 107 F. (2d) 699.

The confusion must be as to the source of origin of the product. *Benrose Fabrics Corp.* v. *Rocenstein*, 183 F. (2d) 355, 358.

The rule laid down by the courts in refusing to interfere with the use of a name or mark is as follows:

> "The test is whether the similitude of the labels would probably deceive a purchaser who exercises ordinary prudence, not the careless buyer who makes no examination." *Schneider Brewing Co.* v. *Century Distilling Co.*, 107 F. (2d) 699, 704.
>
> "One may not fail to use his senses and then say he has been misled." *Elbers* v. *Chicago Printed String Co.*, 39 F. (2d) 315, 318. See also: *Hygrade Food Products Corp.* v. *H. D. Lee Mercantile Co.*, 46 F. (2d) 771.

This was the test applied by the District Court in determining there was no similarity in the labels. 135 F. Supp. 216, 217. It should be noted, however, that the Court of Appeals for the Fourth Circuit seemed to take for granted

that the District Court, in arriving at its decision that there was no such similarity in the labels that would deceive a purchaser who exercised ordinary prudence, applied the test of placing the two labels side by side. There is no evidence to support this assumption by the Court of Appeals.

In addition, the attention of this Court is invited to the fact that the Court of Appeals, in its opinion, quoted with disapproval certain language from the opinion of the District Judge, as follows:

> "After a careful and painstaking study of the label, the contents, markings, get up and the over all appearance of each, I come up with the conclusion that there is no similarity in the two labels and that no confusion would likely result to a purchaser who would exercise ordinary care and prudence." (Appendix, p. 24).

Unfortunately, the quotation as it stands is somewhat misleading since it is not the entire language of the District Court. The Court of Appeals has not quoted the entire sentence as it appears in the District Court opinion, and has failed to indicate any omission of the following: "* * * since each is so vastly different from the other." 135 F. Supp. 217.

The sentence that follows in the opinion of the District Court clearly demonstrates how strongly the District Judge felt that there was no similarity in the labels and packaging: "In fact it is inconceivable to me that one desiring to purchase work socks would be deceived in favor of defendant's 'Trainman Socks' as packaged over against the 'Railroad Sock' of the plaintiff." 135 F. Supp. 217.

The reversal by the Court of Appeals of these findings by the District Court is completely unwarranted by the facts, as determined by the trier of the facts, and by the decisions of this Court, which establish the rules to be

followed by the Federal judiciary in cases such as these. The Court of Appeals has enunciated a radical departure from the decisions of this Court and of the other Circuits, by allowing such a usurpation of a name and mark that are properly in the field of the public domain.

4. The questions presented by this case are of great and recurring significance, both in the administration of the Federal appellate courts with respect to the scope of review by an appellate court and with respect to the delimitation of the rights of a second user of a particular mark, label, design or package that is properly in the field of the public domain, in the face of a claim of trade mark infringement and unfair competition. The serious question of unauthorized fact finding by the Court of Appeals for the Fourth Circuit and the disruptive effect of the decision below, if unreversed, upon the free competition between merchants in commerce make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HAROLD L. LIPTON,
of BOOTH, LIPTON & LIPTON,
FRANCIS H. FAIRLEY,
Counsel for Petitioner.

HAROLD A. LIPTON,
EDGAR H. BOOTH,
of Booth, Lipton & Lipton,
of Counsel.

APPENDIX

Opinion of United States Court of Appeals, for the Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7135

DWIGHT S. WILLIAMS CO., INC.,

Appellant,

versus

LYKENS HOSIERY MILLS, INC.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE.

(Argued April 11, 1956. Decided May 15, 1956.)

Before:

SOPER and DOBIE, *Circuit Judges*, and PAUL, *District Judge*.

PAUL B. BELL (Paul B. Eaton, and Eaton, Bell, Hunt & Seltzer on brief) for Appellant; and

FRANCIS H. FAIRLEY (Harold A. Lipton and Booth, Lipton & Lipton on brief) for Appellee.

DOBIE, *Circuit Judge*:

This civil action, alleging trademark infringement and unfair competition, was instituted in the United States District Court for the Western District of North Carolina by Dwight S. Williams Co., Inc. (hereinafter called Williams) against Lykens Hosiery Mills, Inc. (hereinafter called Lykens). Williams alleged the adoption and long and continuous usage of certain trademarks, in connection with the sale of men's hosiery. These comprise the words "The RAILROAD Sock" used both alone and in connection with the pictorial illustration of a train. Williams also alleged the adoption and long and continuous usage of various train and railroad insignia in connection with the packaging and advertising of its men's work socks together with various pictorial illustrations carrying out a general train and railroad theme in assocation with its trademarks.

During the latter part of 1953, Lykens began manufacturing and shortly thereafter selling and distributing men's work socks throughout the United States under the name TRAINMAN used in association with the pictorial illustration of a train. Williams further alleged that these sales by Lykens, in a dress and package similar to Williams' constituted an effort to trade upon and capitalize upon the good will and identity established by Williams in connection with its trademark "The RAILROAD Sock" and associated marks and designs and that these acts by Lykens constituted unfair competition and trademark infringement.

Lykens admitted use of the trademark TRAINMAN together with pictorial illustrations of a train and denied the ownership by Williams of the trademark "The RAILROAD Sock" and pictorial train illustration. Lykens further alleged that its use of the name TRAINMAN together with a pictorial illustration of a train was lawful in view of alleged uses by others of a train design or illustration in association with various other types of wearing apparel.

Upon trial of the case, the District Judge rendered judgment in favor of Lykens and Williams has appealed to us. The opinion of the District Judge is reported in 135 F. Supp. 213.

Two questions are before us on this appeal:

(1) Has Lykens infringed the registered trademarks of Williams by using in connection with the advertising and sale of its work socks, the name "TRAINMAN" together with a pictorial illustration of a train?

(2) Do the acts of Lykens constitute unfair competition with Williams?

We think these questions must be answered in the affirmative and that the judgment below must be reversed.

Williams is a New York corporation engaged in the business of selling hosiery. The business was established prior to 1911. Williams and its predecessors are now and have been continuously since prior to 1911 engaged in selling hosiery wholesale in their own right and as commission agents for various mills and doing a general wholesale merchandise business in hosiery. This hosiery is sold throughout the United States through wholesale distributors who in turn sell to retailers.

Robert P. Steele and Co., the predecessor of Williams, sometime prior to July, 1913, adopted and began using as a trademark for men's hosiery the pictorial illustration of a train in connection with the words "The RAILROAD Sock". Since prior to July, 1913, Williams and its predecessors have continuously used and are now using the trademark in connection with their sales of men's work socks. The mark has been used in various ways, such as "The RAILROAD Sock" alone, and in combination with pictorial illustrations of trains, both modern and old types. Since at least as early as 1950, and prior to the entry of Lykens into the field, Williams has used in association with its mark, both in packaging and advertising its work socks,

various railroad and train insignia and pictorial illustrations carrying out a general train and railroad theme.

On July 10, 1913, Robert P. Steele and Co. applied for a copyright on the label it was then using which showed the pictorial representation of a train and "The RAILROAD Sock", and on November 18, 1913, the United States Patent Office issued a Certificate of Copyright, No. 3424, covering this label.

On November 10, 1948, Williams applied for registration of its trademark showing the words "The RAILROAD Sock" and the pictorial representation of a modern locomotive and train and on May 2, 1950, the United States Patent Office issued Registration No. 524,743 to Williams for this mark used on socks for men. Williams also owns Registration No. 584,507, issued January 12, 1954, covering the pictorial illustration of an older type locomotive and train; Registration No. 600,543, issued January 4, 1955, for "Sock Line of the Nation"; and Registration No. 602,189, issued February 15, 1955, for "The RAILROAD Sock". All of these registrations were for socks for men and all pertained to the general railroad and train theme used by Williams in selling its work socks.

Williams and its predecessors have spent large sums of money in advertising and popularizing "The RAILROAD Sock" mark in connection with the general train theme. During the years 1951 through 1954, inclusive, Williams spent $42,037.50 in advertising its RAILROAD sock and during that time sold 937,000 dozen pairs of RAILROAD socks. Williams also sells other types of socks under various other trademarks but sales of its RAILROAD socks presently constitute approximately twenty per cent of its business.

Lykens is a corporation chartered under the laws of Pennsylvania in 1946. It is a successor to the firm of Lykens Hosiery Mills, organized in 1938 and is engaged in the business of manufacturing and selling men's hosiery including men's work socks. It formerly conducted its manufacturing operations in Lykens, Pennsylvania, and

in the early part of 1954 moved its entire manufacturing business to Marion, North Carolina.

Sometime prior to 1954, Lykens began using the trademarks LIPTON, LYKENS and THRIFT-PAK on its socks and Lykens is still using these marks.

In the latter part of 1953, Lykens began manufacturing and shortly thereafter selling and distributing men's work socks throughout the United States under the name and style TRAINMAN with a pictorial illustration of a train. Promptly after notice of these sales by Lykens, on January 7, 1954, Williams, through its attorney, notified Lykens of these rights and trademarks of Williams; it also complained of the use by Lykens of the word TRAINMAN and the pictorial illustration of a train. Lykens has continued to sell men's work socks on an expanding nationwide basis under the TRAINMAN name in packages bearing pictorial illustrations of trains.

The Trademark Act of 1946, § 45, 15 U. S. C. A. § 1127, sets out:

> "The term 'trademark' includes any word, name, symbol or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others."

When a manufacturer or dealer has identified his goods by a trademark, which points to him as the source thereof, others are excluded from applying the same or a similar mark to such goods and the function of a trademark is to designate the goods as the product of a particular trader and to protect his good will against the sale of another's product as his. *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403; *McLean* v. *Flemming*, 96 U. S. 245, 254.

In *United Drug Co.* v. *Theodore Rectanus Co.*, 248 U. S. 90, 98, Mr. Justice Pitney described a trademark as:

> "a convenient means for facilitating the protection of one's good-will in trade by placing a distinguish-

ing mark or symbol—a commercial signature—upon the merchandise or the package in which it is sold."

In *Mishawaka Rubber & Woolen Mfg. Co.* v. *S. S. Kresge Co.*, 316 U. S. 203, 205, 86 L. Ed. 1381, 62 S. Ct. 1022, Mr. Justice Frankfurter stated:

> "The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants or what he has been led to believe he wants."

In *Aerick* v. *Rockmont Envelope Co.*, 155 F. (2d) 568, 571, 572, Circuit Judge Murrah observed:

> "Although the primary purpose of a trade-mark is to indicate the origin, manufacture and ownership of the article in the mind of the purchasing public, it it usually associated with the quality of the product which it symbolizes. Trade-marks are no longer 'regarded simply as an indicium of a known source', they now 'perform the additional function of an advertising and selling device'."

The rights of Williams are not limited to the exact style shown on its package or in its registrations. Its adoption and continuous usage of the railroad mark and the pictorial illustration of a train together with other train and railroad indicia and symbols for many years prior to the entry of Lykens into the field give to Williams rather broad rights to any device, mark or symbol of this character within the significance and meaning of train or railroad as applied to men's socks.

In *McLean* v. *Fleming*, 96 U. S. 245, 251, Mr. Justice Clifford thus stated the classic test in these cases:

> "What degree of resemblance is necessary to constitute an infringement is incapable of exact definition, as applicable to all cases. All that courts of justice can do, in that regard, is to say that no trader can adopt a trade-mark so resembling that of another trader, as that ordinary purchasers, buying with ordinary caution are likely to be misled."

In determining infringement, it is not necessary to prove actual confusion. The test is whether there is likelihood of confusion. *Noll* v. *Rinex Laboratories Co.*, 25 F. Supp. 239, 240; *Mershon Co.* v. *Pachmayr*, 220 F. (2d) 879. Nevertheless, at the trial below, Williams did prove one instance of actual confusion where a clerk handed Mr. Charles Trotter "RAILROAD" socks when he asked for "TRAINMAN" socks. The District Court excluded additional evidence offered by Williams relating to other confusion in the trade.

See, also, *National NuGrape Co.* v. *Guest*, 69 F. Supp. 863, aff'd 164 F. (2d) 874, cert. denied 333 U. S. 874; *Crawford-Austin Manufacturing Co.* v. *Clifton Manufacturing Co.*, 25 F. (2d) 976, aff'd 30 F. (2d) 392; *Gehl* v. *Hebe Co.*, 276 Fed. 271; *Lone Ranger, Inc.* v. *Currey*, 79 F. Supp. 190; *Plough, Inc.* v. *Intercity Oil Co.*, 26 F. Supp. 978.

We think there is a clear likeness between the word "Railroad" used here by Williams and the word "Trainmen" employed by Lykens. In *Holeproof Hosiery Co.* v. *Fitts*, 167 Fed. 378, as to hosiery, "No-Hole" was held to be too close to "Holeproof." In *Wonder Manufacturing Co.* v. *Block*, 249 Fed. 748, "Wonder" was decided to convey the same idea as "Wizard". "Wearever" or "Everwear" was declared to simulate "Everlasting" in *Aluminum Cooking Utensil Co.* v. *National Aluminum Works*, 226 Fed. 815. And in *Kraft-Phenix Cheese Corporation* v.

R. E. Robertson, Inc., 9 F. Supp. 125, the court would not permit "Wonder Mix" to be used when contrasted with "Miracle Whip."

In his opinion below, the District Judge stated (135 F. Supp. 213, 217):

> "After a careful and painstaking study of the label, the contents, markings, get up and the over all appearance of each, I come up with the conclusion that there is no similarity in the two labels and that no confusion would likely result to a purchaser who would exercise ordinary care and prudence."

With this we cannot agree.

We think the District Judge laid too much stress on the ocular comparison of the packages of Williams and Lykens, when laid side by side. The test here is not *solely* such a juxtapositional comparison. The whole background of the case must be considered. Yet we do find here striking similarity between the two packages, in which the socks of Williams and those of Lykens are sold, in color, shape and general pattern.

In *Avrick* v. *Rockmont Envelope Co.*, 155 F. (2d) 568, 572-573, Circuit Judge Murrah declared:

> "It is contended that the trial court merely made a side by side visual comparison of the two specimens, and judged the question of infringement solely by the reaction of his trained mind to such comparison. It is not the distinguishing details manifest by ocular comparison in juxtaposition which determines confusing similarity, the test is more objective than that. It is the total effect produced by the designation in the mind of the ordinary purchaser exercising due care in the market place. A prospective purchaser does not ordinarily carry a sample or specimen of the article he knows well enough to

> call by its trade name, he necessarily depends upon the mental picture of that which symbolizes origin and ownership of the thing desired."

A careful study of the entire record here convinces us that the conduct of Lykens cannot be explained by the long arm of coincidence. On the contrary, we think there was a clear attempt by Lykens "to get under the umbrella" of Williams. In our view, the use by Lykens of "Trainman" as contrasted with "Railroad", the use of a picture of a train by Lykens and the similarity between the Williams package and that of Lykens, lead us to the conclusion that Lykens has both infringed the trade-mark of Williams and has been guilty of unfair competition.

Accordingly, the judgment of the District Court must be reversed and the case is remanded to that court with instructions to issue the injunction sought by Williams and for such other and further relief as may be consistent with this opinion.

Reversed and remanded.

Opinion of District Court

IN THE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

Civil Action 1026

—o—

DWIGHT S. WILLIAMS CO., INC.,

Plaintiff,

vs.

LYKENS HOSIERY MILLS, INC.,

Defendant.

—o—

EATON AND BELL, Johnston Building, Charlotte, N. C.
Attorneys for Plaintiff.

FRANCIS H. FAIRLEY, Law Building, Charlotte, N. C.

WILSON WARLICK, *District Judge*

This is an action for unfair competition and infringement filed in the Charlotte Division of this District, and heard by the court without a jury on oral evidence, stipulations and other provided means. The hearing brought out facts as follows:

Plaintiff is a New York corporation engaged in selling hosiery with its place of business on Fifth Avenue in New York City. It does not manufacture hose but as selling agent has its products manufactured for it and under its direction, and thereafter sells to the hosiery trade. It and its predecessors have been engaged continuously as such for approximately thirty five years. On occasion it acts

as commission agent and factor. It sells hosiery over the greater portion of the United States.

The Defendant, Lykens Hosiery Mills, Inc., is a Pennsylvania corporation, and it and its predecessors in title have been engaged in manufacturing men's hose and work socks for approximately thirty years, or more. Formerly its manufacturing plant was located in Lykens, Pennsylvania, but it more recently moved south and is now located in Marion, in the Western District of North Carolina. Subsequent to the institution of this action against it, defendant experienced financial difficulties and until recently its operation was permitted under an order allowing the debtor to remain in possession. At the time of the trial that was its actual status. It now has adjusted its difficulties and having satisfied its creditors is in full possession of the assets of the corporation.

Plaintiff had at a time prior to the charges herein complained of, adopted as a trademark in its hoisery sales, the name "Railroad" in connection with a design of a train and secured on its application two certain registrations with the United States Patent Office for such trademark, all as appears on the exhibits being attached to the complaint filed in the action—one dated May 2, 1950, for Registration #524,743, and another dated January 12, 1954 for Registration #584,507, each showing a train as the design. That these designs are stamped on a transparent cellophane wrapper by a process now available and are used as decorative wrappers on the packaged socks. That each such package holds three pairs of men's work socks.

That on January 4, 1955, and during the pendency of this action, plaintiff registered in the Patent Office under #600,543, this trademark: "Sock Line of the Nation" and on February 15, 1955, under registration #602,189, plaintiff secured "The Railroad Sock" as a trademark. Approximately 20% of the plaintiff's business is derived from the sale of the "Railroad Sock".

The wrapper in which plaintiff markets its "Railroad" work socks and from which the alleged unfair competition and infringement comes about by the marketing process of the defendant is approximately eleven inches long and five inches wide, is made of transparent cellophane and by a process of lamination in conjunction with printing, the following is stamped thereon: A picture of a railroad train of the vintage of one hundred years ago, the engine being much alike in appearance to the "General" now kept in the passenger station of the L & N Railroad in Chattanooga or the "Texas" which is preserved for posterity in Grant Park in Atlanta. It is a replica of a wood burner with large stack and has coupled to it two passenger coaches of the type used in that far off day. The engine and the coaches are painted black, red and green. The smoke coming from the stack is in red and as it flows from the engine and over the tender and coaches, has the word "Railroad Sock" printed in white letters on it. Immediately under that is "Registered U. S. Pat. Office". On a green background, in white letters surrounded by a red border and placed under the engine and coaches will be found these words "Guaranteed a full month's wear in every pair." "Nylon Heel and toe reinforced". In front of the engine this appears: "3 pairs" the figure three being in white with green background and the word pair being printed in red. At the seam on the side of the wrapper are these words in red, bordered with black: "Sock line of the Nation". At the top and bottom of the cellophane wrapper one sees black lines running more or less horizontally. On both the front and the back of the wrapper will be found a genuine facsimile in appearance of the registered trademarks of the following railroads: New York Central System, Nickel Plate Road, New York, New Haven and Hartford Railroad, Burlington Route, Northern Pacific, Illinois Central, the Seaboard Airline Railroad, Reading Lines, Southern Serves the South, the Great Northern Rail-

way, Cotton Belt Route, L & N, Boston & Maine, Wabash and Sante Fe line. All of which the plaintiff secured the right to use by authority of each individual railroad company. On the back of the wrapper again appears "The Railroad Sock". This unquestionably constitutes a unique package, exceptionally attractive, and one that would be unusually easy to retain in the mind. Plaintiff has expended considerable monies through the years in advertising the sale of its socks.

This is the wrapper that the defendant is charged with infringing by its use of a package wrapper in the sale of its manufactured products.

The defendant in more recent years and particularly since marketing conditions have radically changed, has used different trade labels and packages in the sale of its various manufactured products and has advertised its goods for sale under some five or six of their different labelled trade names. Sometime during 1953 it began the marketing of its men's anklets and work hose in a transparent cellophane package with the following markings thereon: The word "Lykens" in white letters on a red oval background. In red letters on a white background these words are found: "Men's Anklets". In white letters on a red background "3 pair" appears. Under that is a present day streamline passenger engine with the cars attached as far as the design appears. On the front of the engine where ordinarily the railroad name or number appears, the letter "L" is found and in some of the allegedly infringed wrappers the word "Lykens" appears in place of the "L". This train is painted white and black. Thereunder these statements are found: "Union Made. Nylon Reinforced Heel and Toe. 100% combed cotton. Laundry Tested." "Size." "Color". On the back of the wrapper the word "Lykens" appears followed by the word "Trainman" and a small picture of the streamline likewise is shown identically as that shown on the front of the wrapper.

The above recitation accurately describes the alleged infringing wrapper in which the defendant markets three pairs of its anklets or work hose and is that product which is charged with the infringement and unfair competition as alleged in the Complaint. This wrapper is attached to these findings and made a part thereof.

The defendant has advertised these socks rather extensively since 1953 as it has done in the sale of all of its products and has evidently expended considerable monies in its efforts to successfully place them on the market.

Among other things plaintiff contends that the word "Trainman" and "Railroad" have the same significance and that defendant's use of the word "Trainman" and the pictorial illustration of a train constitute a colorable imitation of the plaintiff's "Railroad" trademark; and is so similar as likely to cause confusion or mistake and to deceive a purchaser as to the source and origin of the product, and that such infringement of plaintiff's trademark constitutes unfair competition which entitles plaintiff to the injunctive relief sought and the damage later to be determined. Plaintiff does not contend that the defendant's wrapper is a copy of plaintiff's trademark, but does contend that it is a colorable imitation thereof.

The defendant contends that there is no similarity in the wrapper used. That it had no knowledge of plaintiff's wrapper and that it adopted the word "Trainman" as a good suggestion in the sale of its work socks through repeated conversations with various employees of railroad companies in the Lykens, Pennsylvania area. That its modern streamline train could in no wise be confused with the woodburner used by the plaintiff in the marketing of its socks.

Much has been written as to the law in matters of this kind but little it seems could be gained from an assembling of the various authorities that are cited and the law that is contended as being applicable. The term trademark

includes any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others. Trademark Act of 1946, Sec. 45, 15 U. S. C. A. 1127.

> "The proper function of a trademark is that by association with goods it becomes a means of identification of the origin or ownership of the article and hence a symbol of good will. This essential element is the same both in trademark cases and in cases of unfair competition unaccompanied with trademark infringement. The law of trademarks is but a part of the law of unfair competition. Hanover Star Milling Co. v. Metcalf, 240 U. S. 403, 413, 36 S. Ct. 357, 60 L. Ed. 713; Walgreen Drug Stores v. Obear-Nestor Glass Co., 8 Cir., 113 F. 2d 956, 961; F. W. Fitch Co. v. Camille, Inc., 8 Cir. 106 F. 2d 635."

Since no evidence of probative value was offered of actual instances of confusion in the purchase of these goods, the test comes to that of deceptive similarity, and this is whether

> "ordinary purchasers, buying under the usual conditions in the trade and exercising ordinary care, would likely be induced to purchase the article to which the accused trademark is affixed, believing it to be the plaintiff's article. Queen Mfg. Co. v. Isaac Ginsberg & Bros., Inc., 8 Cir. 25 F. 2d 284, 287; S. S. Kresge Co. v. Winget Kickernick Co., 8 Cir., 96 F. 2d 978, 987. Seven Up Co. v. Cheer Up Sales Co., 148 F. 2d 909.
>
> "It is the generally accepted rule that a designation is confusingly similar to a trademark if an ordinary prospective purchaser, exercising due care in the circumstances, is likely to regard it as coming from the same source as the trademarked article. Schneider

Brewing Co. v. Century Distilling Co., supra [10 Cir., 107 F. 2d 699]; Victor American Fuel Co. v. Huerfano Agency Co., D. C., 15 F. 2d 578." Avrick et al. v. Rockmont Envelope Co., 155 F. 2d 568, 572.

The test finally comes to this: Whether the similitude in the labels would properly deceive a purchaser who exercised ordinary prudence, not the careless buyer who makes no examination. *Ph. Schneider Brewing Co.* v. *Century Distillating Co.*, 107 F. 2d 699.

After a careful and painstaking study of the label, the contents, markings, get up and the over all appearance of each, I come up with the conclusion that there is no similarity in the two labels and that no confusion would likely result to a purchaser who would exercise ordinary care and prudence, since each is so vastly different from the other. In fact it is inconceivable to me that one desiring to purchase work socks would be deceived in favor of defendant's "Trainman Socks" as packaged over against the "Railroad Sock" of the plaintiff. I therefore am of the opinion that the trademarks are wholly unalike and that there is no likelihood of confusion; that there is no infringement of plaintiff's marks and that the plaintiff is not entitled to enjoin the defendant from the use of its wrapper. That there has been no unfair competition and that plaintiff is not entitled to recover.

Counsel will submit decree.

This the 24th day of October, 1955.

WILSON WARLICK,
United States District Judge for the Western District of North Carolina.

Federal Rules of Civil Procedure

Rule 52. Findings by the Court.

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) *Amendment.* Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.